

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ROBERT W WOOTTON,

Plaintiff,

v.

PIERCE COUNTY JAIL et al.,

Defendants.

CASE NO. C12-5828 BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR:

MAY 10, 2013

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge, J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. § 636(b)(1)(A) and (B), and Magistrate Judge Rules MJR3 and MJR4.

The Court recommends granting defendants' motion for summary judgment and dismissing this action with prejudice. Plaintiff fails to show that any defendant was deliberately indifferent to his diabetes or that any defendant violated his Fourteenth Amendment rights. Plaintiff was a pretrial detainee during the time in question and his claims are properly considered pursuant to the Fourteenth Amendment rather than the Eighth Amendment, but the analysis is otherwise identical.

1 In the alternative, the Court recommends granting defendants' motion for qualified  
2 immunity because defendants show that plaintiff repeatedly refused meals and medical treatment  
3 and was confrontational and violent in the medical area. Defendants reasonably could have  
4 believed that their use of force was constitutional in that they were trying to provide defendant  
5 treatment. Further, plaintiff fails to show harm when an officer allegedly ate a meal that had been  
6 designated for plaintiff.

#### 7 FACTS

8 It is undisputed that plaintiff was housed at the Peirce County Jail as a pretrial detainee  
9 from December 9, 2011 until sometime in March of 2012 (ECF No. 18, Exhibit G, chronological  
10 medical records). It is undisputed that plaintiff suffers from insulin dependent diabetes. It is  
11 undisputed that plaintiff suffered from both hyperglycemic and hypoglycemic episodes and had  
12 to be taken to the hospital on an emergency basis.

13 Plaintiff alleges that one or more defendants violated his Fourteenth Amendment rights  
14 by failing to provide him a proper diet and medical treatment (ECF 5). Plaintiff also alleges that  
15 Correctional Officer Sandoval violated plaintiff's Fourteenth Amendment rights by allegedly  
16 eating plaintiff's meal, when plaintiff was hospitalized (ECF No. 5, page 7). Plaintiff also alleges  
17 that Officer Gannon violated his Fourteenth Amendment rights when she used force to defend  
18 herself against plaintiff on January 8, 2012.

19 Plaintiff was not a model prisoner. The record shows that when deputies moved plaintiff  
20 from the Puyallup Jail to the Pierce County Jail on December 9, 2011, plaintiff was already  
21 noncompliant and refusing to take his medications (ECF No. 18, Exhibit B, page 2). Plaintiff  
22 threatened to kill the transporting officers and their families. *Id.* Plaintiff head butted one of the  
23 transport officers. *Id.* Plaintiff refused to take insulin on December 9, 2011 (ECF No. 18, Exhibit  
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1 F, page 2). Jail Officials placed plaintiff on a close medical-watch at the time of booking (ECF  
2 No. 18, Exhibit D, page 7). Plaintiff was later sent to a living unit.

3 Plaintiff alleges that he ate breakfast and lunch on December 11, 2011, but there is  
4 nothing to prove he actually ate those meals (ECF No. 18, Exhibit E, pages 3 and 6). Plaintiff's  
5 blood sugar was so low on December 11, 2011, that at 3:30 p.m. jail medical personnel called  
6 911 and sent plaintiff to the hospital (ECF No. 18, Exhibit B, page 3). Plaintiff was stabilized by  
7 5:46 p.m. and returned to the jail later in the evening of December 11, 2011 (ECF No. 18,  
8 Exhibit E, page 7). The next day plaintiff did not follow directions from the medical staff and  
9 plaintiff was "hostile and argumentative." (ECF No. 18, Exhibit G page 4). Medical staff stated  
10 in the medical record that plaintiff was known to "manipulate his blood sugars." *Id.* Thus, only  
11 two days into his incarceration at the Jail, medical staff were questioning if plaintiff was eating  
12 the food being provided to him.

13 On December 19, 2011, plaintiff refused all medical care including blood sugar testing  
14 and his diabetic diet (ECF No. 18, Exhibit B, page 4). That same day, plaintiff's blood sugar  
15 reading was 593. (ECF No. 18, Exhibit G, page 5). On December 22, 2011, plaintiff was seen by  
16 mental health staff because he was refusing medical treatment (ECF No. 18, Exhibit H, page 4).  
17 Mental health staff did not diagnose a mental issue, only a disagreement regarding medical  
18 treatment. *Id.*

19 On January 1, 2012, plaintiff became nonresponsive while he was in the day room of his  
20 unit. Other inmates in the day room notified custody staff that plaintiff was having trouble (ECF  
21 No. 18, Exhibit B, page 6). Jail staff declared a medical emergency and after a "quick  
22 examination," jail staff called 911. *Id.* Jail medical staff measured plaintiff's blood sugar at 45.  
23 *Id.* They attempted to give plaintiff glucose paste, but plaintiff had no gag reflex. *Id.* Plaintiff  
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1 was transported, first to the clinic and then to the hospital (ECF No. 18, Exhibit G, page 6).  
2 Paramedics measured plaintiff's blood sugar after they arrived and it had dropped to 28.  
3 Paramedics administered "glucagon." Only 30 minutes went by from the time the emergency  
4 was declared until plaintiff was transported to the hospital. *Id.* After this incident, P.A. Fleck  
5 ordered that plaintiff consume all meals and snacks in the clinic so that staff could observe and  
6 document plaintiff's food intake. (ECF No. 18, Exhibit G, page 6).

7 By January 7, 2011, plaintiff was refusing medical treatment from P.A. Fleck and a  
8 female physician. He demanded to be seen only by "Dr. B." (ECF No. 18, Exhibit G, page 6).  
9 "Dr. B" consulted with plaintiff, and released him to his unit, and allowed him to eat his food in  
10 the unit. Plaintiff's blood sugar reading on January 7, 2012 at 10:55 p.m. was 419, which is  
11 considered hyperglycemia (ECF No. 18, Exhibit G, page 7). Plaintiff was given insulin and  
12 allowed to take his p.m. snack back to his unit. Plaintiff was informed that staff would re-check  
13 his blood sugar in 6 hours -- at 4:00a.m. Staff stated they would check plaintiff earlier if he was  
14 feeling hypoglycemic (ECF No. 18, Exhibit G, page 6).

15 At 1:16 a.m. on January 8, 2011, only 2 hours after plaintiff had been released to his unit,  
16 jail staff declared a medical emergency. (ECF No. 18, Exhibit G, page 7) Jail staff found plaintiff  
17 on the floor of his cell sweating and shaking. Plaintiff's blood sugar read at 40. Jail medical staff  
18 gave plaintiff glucose gel, which he was able to swallow. Jail staff had already called 911. The  
19 fire department arrived 12 minutes after the emergency had been declared. The fire department  
20 began two I.V. lines and administered glucose (ECF No. 18, Exhibit G, page 7). An unidentified  
21 inmate informed fire department personnel and jail staff that plaintiff was depressed over the loss  
22 of his sister and may have tried to harm himself. *Id.* Plaintiff's blood sugar was at 131 by 2:04  
23 a.m., plaintiff was alert and responsive with normal vital signs and a regular EKG.  
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1 Fire department personnel recommended that plaintiff eat and he was fed immediately.  
2 Plaintiff's blood sugar was at 141 at 3:30 a.m. Medical staff fed plaintiff breakfast in the clinic.  
3 Plaintiff was then placed in a holding cell. By 10:14 a.m., plaintiff's blood sugar had risen to 466  
4 and P.A. Fleck ordered insulin for plaintiff. Plaintiff refused treatment and stated "I ain't taken  
5 that from you bitch." "I don't deal with anyone but Dr. Balderrama." (ECF No. 18, Exhibit G,  
6 page 8). Staff specifically informed plaintiff that uncontrolled blood sugar could lead to a heart  
7 attack and death, but plaintiff still refused treatment. *Id.* Medical personnel called in mental  
8 health providers who examined plaintiff at 3:00 p.m. (ECF No. 18, Exhibit H, page 5). Mental  
9 health providers concluded that plaintiff did not have a mental health issue but that they observed  
10 him to be rude, foul, and yelling at staff. *Id.* Plaintiff expressed dissatisfaction with medical  
11 treatment and was refusing treatment. *Id.*

12 Medical staff attempted to check plaintiff's blood sugar level at 11:00 a.m., on January 8,  
13 2012, but plaintiff refused treatment. *Id.* Plaintiff repeatedly continued to refuse any treatment  
14 until 5:00 p.m. when he became physically abusive toward defendant Gannon and she had to use  
15 force to restrain him (ECF No. 18, Exhibit G, page 10). Correctional staff used a taser during this  
16 incident and placed him in a restraint chair. He continued to refuse medical treatment. *Id.*  
17 Medical staff again contacted mental health staff and they concluded that there was not any  
18 mental health issue but that plaintiff was in a power struggle with medical staff regarding his  
19 treatment (ECF No. 18, Exhibit H, page 5).

20 On January 9, 2012, Dr. Balderrama stated:

21 pt unfortunately has continued with poor cooperation with staff to have better  
22 control of BS (blood sugar), there are concerns that the patient intentionally wants  
23 to have episodes of hypoglycemia or hyperglycemia.  
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1 (ECF No. 18, Exhibit G, page 11). Plaintiff remained noncompliant and was treated for  
2 hyperglycemia for the next three days. *Id.*

3 On January 12, 2012, Dr. Balderrama changed plaintiff's diet from a diabetic diet to a  
4 suicide watch diet (ECF No. 18, Exhibit G, page 12). On January 24, 2012, plaintiff agreed to be  
5 more cooperative with staff regarding his treatment (ECF No. 18, Exhibit G, page 12). On  
6 February 11, 2012, plaintiff was hypoglycemic with a blood sugar reading of 38. Plaintiff stated  
7 that he didn't tell the custody officer because he knew he was being checked at 9:00 p.m. (ECF  
8 No. 18, Exhibit G, page 13). Plaintiff was treated, fed, and kept for observation.

9 Plaintiff refused treatment again on February 26, 2012. (ECF No. 18, Exhibit G, page  
10 14). The medical record shows plaintiff being belligerent and rude to medical staff (ECF No. 18,  
11 Exhibit G, page 14). Plaintiff complained of hypoglycemia while in Court on March 6, 2012, and  
12 he was taken to the clinic and treated (ECF No. 18, Exhibit G, page 15). On March 9, 2012,  
13 correctional deputies observed plaintiff eating slowly and not responding to them. Staff brought  
14 plaintiff to the clinic and treated him for hypoglycemia (ECF No. 18, Exhibit G, page 15). The  
15 Court declared a mistrial on March 9, 2012 (ECF No. 18, Exhibit C, page 24). Retrial began  
16 almost immediately. One day later, on March 10, 2012, plaintiff had elevated blood sugar  
17 readings. (ECF No. 18, Exhibit G, page 15).

#### 18 PROCEDURAL HISTORY

19 Defendants originally asked the Court to consider a motion to dismiss (ECF No. 17).  
20 Defendants had raised the defenses of failure to exhaust administrative remedies, failure to state  
21 a claim, and qualified immunity (ECF No. 17). Defendants attached documents that went far  
22 beyond what was needed to show failure to exhaust administrative remedies. Defendants  
23 attached large portions of plaintiff's medical record (ECF No. 18). Defendants referred to these  
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documents for issues unrelated to exhaustion of administrative remedies in their statement of facts (ECF No. 17, pages 3-5). The Court converted the motion to a motion for summary judgment and gave the parties the chance to submit additional briefing (ECF No. 27). Defendants submitted timely additional briefing (ECF No. 28). Four days before his briefing was due, plaintiff filed a motion for an extension of time (ECF No. 29). While that motion was pending, plaintiff submitted his briefing in opposition to the pending motion for summary judgment (ECF No. 30, and 31). The Court has considered plaintiff's late briefing.

#### STANDARD OF REVIEW

In federal court, summary judgment is required under Fed. R. Civ. P. 56(a) if the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact. *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir.1997). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by “‘showing’ -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts that show a genuine issue for trial. *Id.* at 323-24; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1985); *Anderson*, 477 U.S. at 254 (“the judge must view the evidence presented through the prism of the substantive evidentiary burden”). Conclusory, nonspecific statements in affidavits

are not sufficient; and, the court will not presume “missing facts”. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

### DISCUSSION

#### A. Failure to exhaust administrative remedies.

Plaintiff is required by the Prison Litigation Reform Act to exhaust whatever administrative remedies are available to him prior to filing a complaint in federal court. The relevant portion of the act states:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

Here, plaintiff filed this action while incarcerated and the act applies to him. *See* 42 U.S.C. §1997e(h).

In the Ninth Circuit a motion to dismiss for failure to exhaust is an unenumerated Fed. R. Civ. P. 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003). Defendants have the initial burden of pleading and proving failure to exhaust. *Wyatt*, 315 F.3d at 1119.

Defendants argue that there is an information booklet given to each person booked into the Jail and that one was given to plaintiff (ECF No. 18, Exhibit A). The booklet outlines the prison grievance procedure and the steps a person must take to exhaust his administrative remedies (ECF No. 18, Exhibit A at pages 8 and 9). Defendants’ record shows that plaintiff submitted Kites, but nothing shows that he ever went to the next step and filed a formal grievance (ECF No. 18, Exhibit C, Kites from plaintiff). Defendants show that plaintiff did not exhaust his claims.



1       Once defendants have met their burden of proof, the burden shifts to plaintiff to show that  
2 the grievance system was unavailable or that his efforts to exhaust were hindered. *Albino v.*  
3 *Baca*, 697 F.3d, 1023, 1032 (9th Cir. 2012). Plaintiff argues that he was never given the jail's  
4 information booklet (ECF No. 31, ¶ 6). Thus, he alleges that he did not know how to exhaust the  
5 grievance process. Plaintiff's allegation is corroborated by a February 8, 2012, "Kite" where  
6 plaintiff asks for a copy of the "Prisoners' Hand Book of Pierce County." Plaintiff alleges in his  
7 "Kite" that this was his third request for that material (ECF No. 18, Exhibit C). The Jail's  
8 response was plaintiff should ask the cluster officer for one. There is nothing in the record to  
9 show that plaintiff ever received the information on how to exhaust the grievance process.

10       Plaintiff again requested a copy of the "Prisoners' Information Handbook" on March 12,  
11 2012 (ECF No. 18, Exhibit C). Again the answer was to "just ask the cluster officer." Again,  
12 there is nothing in the record to show that plaintiff ever received the information on how to  
13 exhaust the grievance process.

14       In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court  
15 looks to the pleadings and decides disputed issues of fact. *Albino*, 697 F.3d at 1030. The Court  
16 finds that plaintiff repeatedly requested information that would have included how to exhaust the  
17 grievance procedure (ECF No. 18, Exhibit C Kites). The Court also finds that there is nothing in  
18 the record to support defendants' assertion that plaintiff ever received this information. The  
19 Court concludes that plaintiff's attempts to exhaust the grievance system were hindered by  
20 failure to provide him with the needed information. Under these facts, the Court declines  
21 recommending that the action be dismissed for failure to exhaust administrative remedies.

1 B. Proper parties.

2 Plaintiff has named as defendants Pierce County Jail, Chief Karr, Captain Spencer, Dr.  
3 Balderrama, and an unnamed "Food Manager," but has failed to identify what particular acts by  
4 these defendants allegedly violated his constitutional rights (ECF No. 5).

5 Pierce County Jail is not a governmental entity. The Jail is operated by Pierce County.  
6 Since the Jail is not a separate legal entity, it is not capable of being sued. *See* Fed. R. Civ. P.  
7 17(b). Furthermore, even if plaintiff had named Pierce County, a local governmental unit is not  
8 vicariously liable under §1983 unless plaintiff shows that the entity's custom or policy resulted  
9 in the alleged constitutional violation *See Monell v. New York City Department of Social Services*,  
10 436 U.S. 658, 690 n. 55(1978). There is no evidence of a policy or custom directing the challenged  
11 conduct (ECF No. 5). Therefore, dismissal of the Pierce County Jail is recommended.

12 The claims against Chief Karr and Captain Spencer should also be dismissed because  
13 plaintiff has failed to show how they caused or personally participated in causing harm to plaintiff  
14 (ECF No. 5). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of  
15 supervisory responsibility or position because the theory of respondeat superior is not sufficient  
16 to state a claim under § 1983. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982); *Monell v. New*  
17 *York City Dept. of Social Services*, 436 U.S. 658, 694 n.58 (1978). Therefore, these defendants  
18 should also be dismissed.

19 This leaves the Food Manager, Dr. Balderrama, Corrections Officer Gammon, and  
20 Corrections Officer Sandoval as the only named defendants with individual conduct that is  
21 specifically challenged in plaintiff's responsive documents (*See* ECF No. 31).

22 C. Fourteenth Amendment Claims.

23 The Due Process Clause of the Fourteenth Amendment protects pretrial detainees by  
24 prohibiting the State from punishing them. *See Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979).

1 The Ninth Circuit protects a pretrial detainee's claims using the same analysis it would use with  
 2 a prisoner's claim brought pursuant to the Eighth Amendment.

3 We have long analyzed claims that correction facility officials violated pretrial  
 4 detainees' constitutional rights by failing to address their medical needs  
 5 (including suicide prevention) under a "deliberate indifference" standard. *See,*  
 6 *e.g., Lolli v. County of Orange*, 351 F.3d 410, 418-19 (9th Cir.2003) (**applying**  
 7 **the "deliberate indifference" standard to a diabetic pretrial detainee's claims**  
 8 **of failure to provide care for serious medical needs**).

9 *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1241 (9th Cir. 2010)(emphasis added).

10 The Eighth Amendment to the Constitution prohibits "cruel and unusual punishments."  
 11 To establish an Eighth Amendment violation, a detainee must allege both an objective element--  
 12 that the deprivation was sufficiently serious--and a subjective element--that a jail official acted  
 13 with deliberate indifference. *Young v. Quinlan*, 960 F.2d 351, 359 (3rd Cir. 1992).

14 1. Medical treatment and food.

15 The Constitution prohibits deliberate indifference to a detainee's serious medical needs.  
 16 *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Jones v. Johnson*, 791 F.2d 769, 771 (9th Cir.  
 17 1986). The indifference to medical needs must be substantial; a constitutional violation is not  
 18 established by negligence or "an inadvertent failure to provide adequate medical care." *Estelle*,  
 19 429 U.S. at 105-06; *Anthony v. Dowdle*, 853 F.2d 741, 743 (9th Cir. 1988).

20 The government has an obligation to provide medical care for pre trial detainees, and the  
 21 Constitution prohibits deliberate indifference to their serious medical needs. *Estelle*, 429 U.S. at  
 22 103 (1976). Such conduct is actionable under 42 U.S.C. § 1983. *See, e.g., McGuckin v. Smith*,  
 23 974 F.2d 1050, 1059 (9th Cir. 1992), *reversed on other grounds, WMX Technologies, Inc. v.*  
 24 *Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997).

To establish deliberate indifference, a detainee must show that a defendant purposefully  
 ignored or failed to respond to the detainee's pain or possible medical need. *McGuckin*, 974

1 F.2d at 1060; *Estelle*, 429 U.S. at 104. A determination of deliberate indifference involves an  
2 examination of two elements: (1) the seriousness of the medical need; and (2) the nature of  
3 defendants' response to that need. *McGuckin*, 974 F.2d at 1059. A serious medical need exists if  
4 the failure to treat the condition could result in further significant injury or the unnecessary and  
5 wanton infliction of pain. *Id.*

6 In order to establish deliberate indifference there must first be a purposeful act or failure  
7 to act on the part of defendant. *Id.* at 1060. A difference of opinion between a detainee and  
8 medical authorities regarding proper medical treatment does not give rise to a §1983 claim.  
9 *Franklin v. Oregon, State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981). Furthermore,  
10 conclusory, nonspecific statements in affidavits are not sufficient; and, the court will not  
11 presume "missing facts". *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

12 Plaintiff's diabetes is a serious condition, which requires medical treatment. Therefore,  
13 the Court moves to the second part of the analysis and examines defendants' response to  
14 plaintiff's serious condition. Plaintiff has included a number of conclusory statements that one  
15 or more of the defendants failed to provide adequate care for his diabetic condition (*see* ECF No.  
16 31, pages 3) and attaches medical records from St. Joseph's Medical Center, which document  
17 treatment that he received when he was brought from the Pierce County Jail (*Id.* at pages 5 – 22).  
18 The conclusory statements regarding improper treatment are insufficient to fulfill plaintiff's  
19 burden to present admissible evidence, (*see Lujan v. National Wildlife Federation*, 497 U.S. at  
20 888-89), and the records from St Joseph's do not provide any evidence that defendants acted  
21 with deliberate indifference.

22 To the contrary, the Court's examination of plaintiff's medical record shows that  
23 defendants were trying to stabilize plaintiff's blood sugars, but that plaintiff was less than  
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1 cooperative. Plaintiff repeatedly failed to allow defendants to give him insulin (ECF No. 18,  
2 Exhibit F, page 2). Plaintiff repeatedly failed to allow defendants to monitor his blood sugar  
3 levels (ECF No. 18, Exhibit B, page 4). Plaintiff has presented no admissible evidence to dispute  
4 this showing.

5 Also, plaintiff claims that the meals provided to him were not appropriate, but he does  
6 not support his claim with any admissible evidence. Furthermore, the record shows that plaintiff  
7 repeatedly refused to eat the meal provided to him (ECF No. 18, Exhibit B, page 9); (ECF No. 31  
8 Attachment A-14). The record shows that plaintiff claimed that he could not chew the food (ECF  
9 No. 18 Exhibit G, page 6 (entry for December 19, 2011)). Defendants tried a different diet (ECF  
10 No. 18, Exhibit G, page 12 (entry for January 12, 2012)). This amounts to nothing more than a  
11 difference of opinion regarding what an appropriate diabetic diet is. As discussed earlier, a  
12 difference of opinion between a detainee and medical authorities regarding proper medical  
13 treatment does not give rise to a §1983 claim. *Franklin v. Oregon, State Welfare Div.*, 662 F.2d  
14 1337, 1344 (9th Cir. 1981).

15 The Court also considered defendants' response to plaintiff's episodes of high or low  
16 blood sugar. Whenever plaintiff went into shock or exhibited symptoms of low blood sugar,  
17 defendants intervened -- swiftly, decisively, and effectively. For instance, on January 1, 2012,  
18 only thirty minutes elapsed from the time that an emergency was declared, to the time plaintiff  
19 left the jail for a hospital (ECF No. 18, Exhibit G, page 6). It took only three minutes to evaluate  
20 plaintiff and call for a 911 response. *Id.* Further, both jail staff and the fire department treated  
21 plaintiff until he was taken to the hospital.

22 When medical staff became concerned that plaintiff may be attempting to manipulate his  
23 blood sugar levels, they actually ordered that plaintiff's meals and snack be eaten in the clinic  
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1 where plaintiff's food intake was monitored (ECF No. 18, Exhibit G, page 6). While defendants  
2 had great difficulty in stabilizing plaintiff's blood sugar, plaintiff fails to show any deliberate  
3 indifference to his medical needs. If anything, the record shows that plaintiff was deliberately  
4 indifferent to his own medical needs. His motivations remain a mystery, although one might  
5 surmise that his intention was to manufacture a claim, where none existed. There are several  
6 references in the record of plaintiff's intention to "sue" for damages (See ECF No. 18, Exhibit B,  
7 pages 9, 13). Plaintiff was regularly violent and belligerent (*Id.*) The Court recommends granting  
8 defendants' motion for summary judgment on this issue.

9       2.       Use of force.

10       The use of excessive force by a law enforcement officer states a valid claim under 42  
11 U.S.C. § 1983. The Court's threshold inquiry for such a claim is whether the force was applied in  
12 a good faith effort to maintain or restore discipline, or applied maliciously and sadistically to  
13 cause harm. *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 6 (1992); *Wilson v. Seiter*, 501 U.S.  
14 294, 298-99 (1991).

15       The record shows plaintiff being loud, abusive, and belligerent on January 8, 2012, (ECF  
16 No. 18, Exhibit B, page 9). Plaintiff attacked Deputy Gannon, and she defended herself. Other  
17 officers arrived and attempted to restrain plaintiff and place him in a restraint chair. When  
18 plaintiff continued to resist, officers used a taser to gain his compliance. *Id.* Deputy Gannon was  
19 injured during this encounter. *Id.*

20       Plaintiff fails to show that the force used was excessive or that any defendant harbored an  
21 improper motivation. (ECF No. 18, Exhibit B, page 9). While this Court is not called upon to  
22 decide issues of fact, plaintiff has failed to present admissible evidence to support his allegations  
23 that defendant's responses were anything more than an appropriate attempts to deal with an  
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1 unruly, violent, and generally noncompliant inmate. The Court finds that defendant Gannon's  
 2 actions were constitutional. The Court recommends granting defendants' motion for summary  
 3 judgment on this claim.

4 3. Lunch on January 5, 2012.

5 Plaintiff alleges that on January 4, 2012, Deputy Sandoval ate plaintiff's meal while at  
 6 the hospital. The record reflects that this incident actually occurred on January 5, 2012. The  
 7 progress states:

8 I received a call from nursing that the patient had been doing well with relatively  
 9 good control of blood sugars for him, when he had a pre-lunch reading of 292.  
 10 The patients [sic] tray was to be delivered, and the patient received 6 units of  
 11 NovoLog sliding-scale [insulin]. There was then some discrepancy with the  
 12 patients [sic] tray, where apparently nursing staff brought in only the tray that was  
 13 for his Police guard, and did not deliver the patients [sic] tray. When the patients  
 14 [sic] tray arrived, then the patient refused to eat it. It is unclear to me exactly what  
 15 happened, whether the guard received the tray that was scheduled for the patient,  
 16 and then began to eat that and then the patient did not eat his tray because it was  
 17 the non-diabetic tray, or whether he did not eat his tray because it was cold. The  
 18 patient states that this is not exactly what happened he indicates that this guard  
 19 had eaten off his tray and that he did not want to eat it.

20 (ECF No. 31, Attachment A-14). In another entry, hospital staff state:

21 There was an additional episode on 01/05/2012 where the patient received his  
 22 sliding scale coverage [insulin] as his meal was brought into the room and then  
 23 refused to eat the meal for reasons that are still unclear to this provider. Per report  
 24 of Nursing, there was some confusion with the patients [sic] tray and his Pierce  
 County Jail guards [sic] tray. Per report of patient, this was due to a dispute with  
 his guard and his guard denying him his tray. After this episode, the patients [sic]  
 blood sugar dropped down to 34. He then received juice and crackers and was  
 willing to eat his meal. Blood sugar resolved promptly...

20 (ECF No. 31, Attachment A-7). Plaintiff has the burden of proving that Officer Sandoval's  
 21 conduct caused him harm. *Shapely v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407  
 22 (9th Cir. 1985). Plaintiff fails to make this showing. The record shows confusion over what meal  
 23 was to be served to what person. Even assuming plaintiff's allegations are true, plaintiff still fails  
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1 to state a claim because he was not harmed by the incident. Once plaintiff agreed to eat, his  
2 blood sugar levels were quickly restored to normal ranges. Further, plaintiff's own exhibits show  
3 that it was plaintiff who refused to eat (ECF No. 31, Attachment A-14). The Court recommends  
4 granting defendants' motion for summary judgment.

5 C. Qualified immunity.

6 A public official performing a discretionary function enjoys qualified immunity in a civil  
7 action for damages, provided the public official's conduct does not violate clearly established  
8 federal statutory or constitutional rights of which a reasonable person would have known.  
9 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted); *see also Anderson v.*  
10 *Creighton*, 483 U.S. 635, 638 (1987) ("whether an official protected by qualified immunity may  
11 be held personally liable for an allegedly unlawful official action generally turns on the  
12 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly  
13 established' at the time it was taken") (*quoting Harlow*, 457 U.S. at 818, 819); *Sorrells v. McKee*,  
14 290 F.3d 965, 969 (9th Cir. 2002); Qualified immunity "provides ample protection to all but the  
15 plainly incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 495  
16 (1991) (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Qualified immunity is "an  
17 affirmative defense that must be pleaded by a defendant official." *Harlow*, 457 U.S. at 815  
18 (*citing Gomez v. Toledo*, 446 U.S. 635 (1980)). The immunity is "*immunity from suit* rather than  
19 a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)(*italic in original*).

20 The Supreme Court established a two-part test for determining whether an official is  
21 entitled to qualified immunity. The Court must determine whether the facts, taken in the light  
22 most favorable to plaintiff, demonstrate that defendants' conduct violated a federal statutory or  
23 constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part by Pearson v.*  
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1 *Callahan*, 129 S. Ct. 808, 818 (2009). In addition, the Court must ascertain whether the federal  
2 statutory or constitutional right at issue was “clearly established” at the time of the alleged  
3 violation. *Id.* at 201. Although the U.S. Supreme Court’s holding in *Saucier* required that the  
4 determination of a violation of a federal right be the initial inquiry, the Supreme Court later held  
5 “that the *Saucier* protocol should not be regarded as mandatory in all cases, [however] we  
6 continue to recognize that it is often beneficial”. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

7 For a law to be “clearly established,” it must be sufficiently clear that a reasonable  
8 official would understand that his or her action violates that right. *Anderson v. Creighton*, 483  
9 U.S. 635, 640 (1987). In the absence of binding precedent, the court may look to whatever  
10 decisional law is available in order to determine whether or not the law was clearly established at  
11 the time the alleged acts occurred. *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985)  
12 (citations omitted). “Until this threshold immunity question is resolved, discovery should not be  
13 allowed.” *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982).

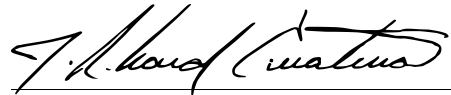
14 Defendants’ actions do not violate clearly established law. Plaintiff, a diabetic, was given  
15 a diabetic diet and medical treatment. Plaintiff alleges that he was unable to eat the meals  
16 provided, (ECF No. 5), but medical staff believed plaintiff may have been manipulating his  
17 blood sugar levels. Medical staff directed that plaintiff eat in the clinic so his food intake could  
18 be monitored (ECF No. 18, Exhibit G, page 6). Plaintiff fails to show any violation of clearly  
19 established law.

20 The Court has considered the use of force and the allegation that an officer ate a meal  
21 designated for plaintiff. The use of force was objectively reasonable and in response to physical  
22 aggression. Plaintiff fails to show any injury as a result of the alleged denial of food and the  
23 record discloses that plaintiff refused food offered to him. Plaintiff fails to show that clearly  
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1 established law has been violated. The Court recommends that qualified immunity serve as an  
2 alternative reason for dismissal of plaintiff's claims.

3 The Court recommends revoking plaintiff's in forma pauperis status for the purpose of  
4 appeal in this action. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties  
5 shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed.  
6 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
7 de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time  
8 limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on  
9 May 10, 2013, as noted in the caption.

10 Dated this 12th day of April, 2013.

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12 J. Richard Creatura  
13 United States Magistrate Judge  
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